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**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-2215**

May 30, 2006

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Daniel P. Mulhollan, Director  
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Dear Director Mulhollan:

I write to you regarding a question of law regarding eminent domain. A proposed intermodal rail facility is currently being considered in Erie Township, Michigan which is located in my district. There have been several press reports that eminent domain will be used by the railroad corporation. Many of my constituents are confused and worried as to the use of eminent domain. Please answer the following questions to clarify the law regarding eminent domain.

1. When railroads wield eminent domain power, is that based upon federal or state statutory authority? What are the parameters of this power?
2. Please specify the steps that are needed for a railroad to acquire property through eminent domain?
3. Are there legal remedies an individual may exercise should one challenge the taking of their property?

It is important that the citizens of Erie Township have the opportunity to express their concerns regarding this project and that their concerns are taken into account as to the proposed project. It is equally important that as the process moves forward that it is fair, open and transparent so that all who are interested are able to have their views and concerns considered. The Congressional Research Service answers will help clarify the process as to the eminent domain power, who will be wielding it and the process of condemnation.

If you have any questions, please feel free to contact me or my Jack Maniko of my staff at 202-225-4071. I look forward to your answers to these questions and thank you for your assistance

Sincerely,



John D. Dingell  
Member of Congress



## **Memorandum**

June 27, 2006

**TO:** Hon. John Dingell  
Attention: Jack Maniko

**FROM:** Jared Huber<sup>1</sup>  
Law Clerk  
American Law Division

**SUBJECT:** Eminent Domain and Railroads

Pursuant to your request on June 16, 2006, this memorandum responds to questions regarding the use of eminent domain by railroads to acquire property in Michigan. Your questions are presented in **bold** and are followed by a response.

**1. When railroads wield eminent domain power, is that based upon federal or state statutory authority? What are the parameters for this power?**

Eminent domain is the inherent power of a governmental entity to take privately owned property and convert it to public use without the consent of the owner, subject to reasonable compensation for the taking. The U.S. Supreme Court has said that eminent domain is an incident of federal sovereignty and an “offspring of political necessity.”<sup>2</sup> The term “public use” refers to the broad scope of the “public interest,” which may include private transfers for private uses with limited public access.<sup>3</sup> The right to condemn lands for public purposes is vital to every government. While no express provision granting the power of eminent domain appears in the U.S. Constitution, the “just compensation” clause of the Fifth Amendment creates an obligation to pay for governmental interference with private property amounting to a taking.

<sup>1</sup> This memorandum was prepared under the supervision of Robin Jeweler, Legislative Attorney, American Law Division.

<sup>2</sup> *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

<sup>3</sup> See *Kelo v. City of New London*, 125 S.Ct 2655 (2005). See also *Hawaii v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). For a summary and analysis of these cases, see CRS Report RS22189, *Condemnation of Private Property for Economic Development: Kelo v. City of New London*, by Robert Meltz.

There is no federal right of eminent domain given to any railroad in active use today, except Amtrak.<sup>4</sup> In the 19<sup>th</sup> Century, expansion and economic development resulted in the conferral of a federal power of eminent domain on the land-grant railroads, which used the power to take lands for relatively low compensation in order to increase rail networks throughout the nation. Private railroads were afforded the status of “common carriers,” commercial enterprises “making their services available to all comers.”<sup>5</sup> Thus, the public use of taking was justified even under the narrow conception of “public use” then in effect. While there was no formal decision to withdraw the railroads’ use of eminent domain, the federal government has shied away from extending such power again, except for Amtrak.

While the Fifth Amendment applies to federal government takings, the power of eminent domain is inherent in the sovereignty of the states as well. The manner and extent of taking private property for public use in Michigan is regulated by principles contained in the State constitution and laws in addition to the federal constitution. The Michigan Constitution provides that “[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.”<sup>6</sup> In 2004, the Supreme Court of Michigan held that “[u]ltimate private ownership of lands proposed for condemnation...does not necessarily render the taking of land unconstitutional under the ‘public use’ requirement.... ‘In every instance of turnpike, plank road, bridge, ferry, and canal companies, [eminent domain] has been employed, as well as those of railroads.’”<sup>7</sup>

**2. Please specify the steps that are needed for a railroad to acquire property through eminent domain.**

Michigan permits railroads to exercise the power of eminent domain. Under Michigan law, the Railroad Code of 1993 authorizes railroad companies to purchase, receive by voluntary grant and donations, or take possession of lands and real estate as necessary for the construction, maintenance, or accommodation of railroad stations, depots, and other accommodations.<sup>8</sup> Such property shall not be taken until compensation is agreed upon by the parties, unless there is owner consent.<sup>9</sup> However, if a railroad company, including non-Michigan railroads authorized to operate in the State, and a landowner fail to agree upon a purchase price for real or personal property, then condemnation proceedings may be commenced under the State Uniform Condemnation Procedures Act (UCPA) to take the property.<sup>10</sup> “Take” is defined as a “secure transfer of ownership...by involuntary expropriation.”<sup>11</sup>

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<sup>4</sup> 49 U.S.C. § 24311.

<sup>5</sup> *Kelo* at 2662 (2005).

<sup>6</sup> M.C.L.A. Const. Art. 10, § 2.

<sup>7</sup> *County of Wayne v. Hathcock*, 684 N.W.2d 765, 795 (Mich. 2004)(quoting *Swan v. Williams*, 2 Mich. 427, 439 (1852)).

<sup>8</sup> M.C.L.A. § 462.223(c).

<sup>9</sup> *Id.*

<sup>10</sup> M.C.L.A. § 462.241.

<sup>11</sup> M.C.L.A. § 213.51.

For acquisition of public property (owned by state, city, village, or township), the Code contains procedures for compensatory offers.<sup>12</sup> If the parties cannot agree on a purchase price, the measure for compensation is the land's appraised value.<sup>13</sup>

Generally, all actions in Michigan commenced after May 1, 1980 for the acquisition of property by an agency under the power of eminent domain must be commenced pursuant to and governed by the UCPA.<sup>14</sup> The UCPA provides procedures for the condemnation, acquisition, or exercise of eminent domain for real and personal property by public or private agencies (here a railroad) and provides for damages and remedies.<sup>15</sup> However, it does not confer the power of eminent domain if no other statutory authority, for example, the Railroad Code, exists.<sup>16</sup> Unless otherwise provided, all laws and court rules applicable to civil actions apply to condemnation proceedings.<sup>17</sup>

The venue for condemnation proceedings brought by the State is laid in the circuit court of the county where the land is situated. This circuit court will have full jurisdiction over the subject matter to hear such proceedings and adjudge all matters touching the proceeding, including the rights and interests of all concerned.<sup>18</sup>

Under the UCPA, before initiating negotiations for the purchase of any property, a public or private agency must establish an amount which it believes to be just compensation and submit to an owner a good-faith offer to acquire the property for the established amount. The offer must also state whether the agency reserves its right to bring a federal or state cost recovery action pursuant to the presence of hazardous substances.<sup>19</sup>

An agency or employee of an agency may enter on property before filing a condemnation action for the following purposes:

- making surveys, measurements, examinations, tests, soundings, and borings;
- taking photographs or samplings;
- appraising the property;
- conducting an environmental inspection;
- determining whether the property is suitable to take for public purposes.<sup>20</sup>

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<sup>12</sup> M.C.L.A. § 462.243.

<sup>13</sup> *Id.*

<sup>14</sup> M.C.L.A. § 213.75.

<sup>15</sup> M.C.L.A. §§ 213.51 et seq. A "private agency" is defined as "a person, partnership, association, corporation, or entity, other than a public agency, authorized by law to condemn property." M.C.L.A. § 213.51(h).

<sup>16</sup> M.C.L.A. § 213.52.

<sup>17</sup> *Id.*

<sup>18</sup> M.C.L.A. § 213.1.

<sup>19</sup> *Id.*

<sup>20</sup> M.C.L.A. § 213.54 (3).

The entry may be made on reasonable notice to the owner and at reasonable hours, and the owner must be given a reasonable opportunity to accompany the agency during the entry.<sup>21</sup>

The UCPA requires that condemnation proceedings must be commenced by the filing of a petition or complaint in the proper court. The complaint must contain all of the provisions found in M.C.L.A. § 213.55(4).

### **3. Are there legal remedies an individual may seek should one challenge the taking of his/her property?**

Under the UCPA, within the time prescribed to responsively plead after service of a complaint, an owner of the property, desiring to challenge the necessity of an acquisition of the property for the purposes stated in the complaint, may file a motion in the pending action, asking that the necessity be reviewed.<sup>22</sup> The hearing is directed to occur within 30 days after the motion's filing. With respect to private agencies, the court is to determine the public necessity, although the granting of a certificate by a public service commission constitutes a prima facie case that the project is required by public necessity.<sup>23</sup> Within 60 days after the hearing is first scheduled, the court will make a final judgment.<sup>24</sup>

In addition, the UCPA specifically provides for appeals to the court of appeals from final judgments or decisions otherwise applicable as a matter of right.<sup>25</sup> An order of the trial court upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court.<sup>26</sup> In the absence of an appeal of the order, no appeal may be granted, and the order is not appealable as part of an appeal from a judgment as to just compensation.<sup>27</sup> The UCPA also provides that a failure to file a motion to review necessity in the trial court waives the right to have necessity reviewed or further considered.

Our survey of Michigan case law does not disclose any decisions analyzing a railroad's use of the UCPA to condemn private property.

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<sup>21</sup> *Id.*

<sup>22</sup> M.C.L.A. § 213.56 (1).

<sup>23</sup> M.C.L.A. § 213.56 (3).

<sup>24</sup> M.C.L.A. § 213.56 (4).

<sup>25</sup> M.C.L.A. § 600.309.

<sup>26</sup> M.C.L.A. § 213.56 (6).

<sup>27</sup> *Id.*